

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA S. PETERS)	
Claimant)	
)	
VS.)	Docket No. 268,461
)	
CITY OF OVERLAND PARK)	
Self-Insured Respondent)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 4, 2007, Order entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on July 10, 2007. Matthew L. Bretz, of Hutchinson, Kansas, appeared for claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for self-insured respondent.

The Administrative Law Judge (ALJ) found that K.S.A. 2006 Supp. 44-523(f) could affect substantive rights if applied retroactively. However, in this case, the five-year limit had not run before the new subsection went into effect on July 1, 2006. The ALJ found that in this case, with the amendment of K.S.A. 44-523(f) by the 2006 Kansas Legislature, claimant was required to either prosecute her claim by August 9, 2006, or show good cause for an extension of time by August 9, 2006. Since claimant did neither, the ALJ dismissed her claim for lack of prosecution.

The record is the same as that considered by the ALJ and consists of the transcript of the April 2, 2007, Motion Hearing, together with the pleadings contained in the administrative file. The record also contains the transcripts of the depositions of Debra S. Peters taken August 10, 2005; Ted O'Dell taken December 7, 2005; Dr. Truett Lee Swaim taken March 1, 2006, with exhibits; Dr. Robert R. Brown taken November 17, 2005, with exhibits; and the transcript of the October 3, 2001, preliminary hearing and exhibits.

ISSUES

Claimant contends that the ALJ exceeded his jurisdiction by dismissing this claim for lack of prosecution based on K.S.A. 2006 Supp. 44-523(f). Claimant argues that K.S.A. 2006 Supp. 44-523(f) is to be applied prospectively, not retroactively because retroactive

application would have a prejudicial affect on claimant's substantive rights and is an impermissible taking without due process. In the alternative, claimant argues that a dismissal pursuant to K.S.A. 2006 Supp. 44-523(f) is a dismissal without prejudice. Accordingly, claimant is entitled to a reinstatement of her claim.

Respondent argues that the Board need not reach the issue of whether K.S.A. 2006 Supp. 44-523(f) applies prospectively or retroactively. Respondent contends that since claimant's five-year period did not expire until August 9, 2006, after the amendment of K.S.A. 2006 Supp. 44-523(f), claimant had more than 30 days to schedule her case for a regular hearing or request an extension of time pursuant to the amendment. If the Board reaches the issue of prospective or retroactive application of K.S.A. 2006 Supp. 44-523(f), respondent argues that the amendment has no impact on any substantive right of the parties. Respondent requests, in the event the Board decides the issue of prospective or retroactive application of K.S.A. 2006 Supp. 44-523(f), that it find the amendment to have retroactive application. Respondent also contends that claimant's issue concerning whether the dismissal is with or without prejudice, has not been ruled on by the ALJ and is, therefore, premature for consideration by the Board.

The issues for the Board are:

- (1) Is K.S.A. 2006 Supp. 44-523(f) to be applied prospectively or retroactively?
- (2) Was claimant required to have prosecuted her claim by August 9, 2006, or show good cause for an extension by August 9, 2006?
- (3) Is a dismissal of a claim under K.S.A. 2006 Supp. 44-523(f) a dismissal with prejudice or without prejudice?

FINDINGS OF FACT

Claimant filed an Application for Hearing on August 9, 2001, claiming injuries to her low back and right leg that arose out of and in the course of her employment with respondent. On November 17, 2006, respondent filed a Motion to Dismiss this claim pursuant to K.S.A. 2006 Supp. 44-523(f). Respondent's Motion noted that claimant's case had been filed on August 8, 2001,¹ had not been to a regular hearing, had not been resolved by means of a settlement hearing, and had not been resolved by means of an agreed award. Since more than five years had passed from the filing of the application for hearing, respondent asserted it was entitled to dismissal of the claim for lack of prosecution. Claimant filed an Opposition to Motion to Dismiss on December 26, 2006, arguing that the amendment to K.S.A. 44-523(f) should be applied prospectively to cases

¹ Form K-WC E-1, Application for Hearing, was signed by claimant on August 8, 2001, but was filed with the Division of Workers Compensation on August 9, 2001.

under the Workers Compensation Act and that, accordingly, the ALJ should deny claimant's Motion to Dismiss.

A motion hearing was held on April 2, 2007, at which time counsel for the parties argued their respective positions. During the hearing, the ALJ asked:

JUDGE HURSH: So if these cases are dismissed, does the respondent have a case under 534a to seek reimbursement of the benefits paid from the Workers' Compensation Fund?

[Attorney for Respondent] That really gets to the second level of analysis on this case, as to whether or not the claim is dismissed with prejudice or without prejudice, I assume. And since the statute is silent, I'm assuming it's a dismissal without prejudice. . . .²

The ALJ found claimant was required to have either prosecuted her claim to final hearing by August 9, 2006, or have shown good cause for an extension of time by August 9, 2006. Claimant did neither. Accordingly, respondent's motion to dismiss was granted.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-523(b) states:

Whenever a party files an application for hearing pursuant to K.S.A. 44-534 and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be granted if all parties agree. An extension of the foregoing time limits may also be granted:

(1) If the employee is being paid temporary or permanent total disability compensation;

(2) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to submission by the claimant; or

² Motion Hearing (Apr. 2, 2007) at 12.

(3) on application for good cause shown.

K.S.A. 2006 Supp. 44-523(f) states:

Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

In *Halley*,³ the Kansas Supreme Court stated:

On the question of the retrospective application of a statute, we have said:

“The general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively. This rule is normally applied when an amendment to an existing statute or a new statute is enacted which creates a new liability not existing before under the law or which changes the substantive rights of the parties.

“The general rule of statutory construction is modified where the statutory change is merely procedural or remedial in nature and does not prejudicially affect the substantive rights of the parties.

“While generally statutes will not be construed to give them retrospective application unless it appears that such was the legislative intent, nevertheless when a change of law merely affects the remedy or law of procedure, all rights of action will be enforced under the new procedure without regard to whether or not the suit has been instituted, unless there is a savings clause as to existing litigation.”⁴

³ *Halley v. Barnabe*, 271 Kan. 652, 24 P.3d 140 (2001)

⁴ *Id.* at 657-58, quoting *Davis v. Hughes*, 229 Kan. 91, 101, 622 P.2d 641 (1981), and *Nitchals v. Williams*, 225 Kan. 285, Syl. ¶ 1-3, 590 P.2d 582 (1991); see also *Ripley v. Tolbert*, 260 Kan. 491, 921 P.2d 1210 (1996); *Lakeview Village, Inc. v. Board of Johnson County Comm’rs*, 232 Kan. 711, 659 P.2d 187 (1983).

In *Lyon*,⁵ the Kansas Supreme Court stated:

The liability of an employer to an injured employee arises out of contract between them, and the terms of a statute are embodied in that contract. The injured employee must therefore recover on the contract, and his cause of action accrues on the date of the injury. The substantive rights between the parties are determined by the law in effect on the date of injury. Amendments to the compensation act which are merely procedural or remedial in nature, and which do not prejudicially affect substantive rights of the parties, apply to pending cases. The general rule, however, is that a statute will operate prospectively rather than retrospectively, unless its language clearly indicates that the legislature intended the latter, and that retrospective application will not be given where vested rights will be impaired.

ANALYSIS

The ALJ, citing *Halley*, noted the general rule that statutes are construed to operate prospectively unless the language of the statute expresses a clear intent that it is to operate retroactively. The ALJ then observed that K.S.A. 2006 Supp. 44-523(f) expresses no such intent. The ALJ further found that the statute could affect the substantive rights of a claimant if applied retroactively and, therefore, was not a procedural amendment only. The Board agrees with the ALJ's analysis up to this point. However, the ALJ then reasoned that because the five-year period had not expired by the time the statute took effect and, therefore, claimant had time to prosecute her claim, the statute's effect was procedural as to her claim and would apply. The Board disagrees. The statute should be applied evenly and equally to all claims. All claims are entitled to the same five-year period before they are subject to dismissal. Wherefore, the statute applies to accidents that occur after the effective date of the statute. Because the statute operates prospectively, it does not affect accidents that occurred before its effective date.

CONCLUSION

K.S.A. 2006 Supp. 44-523(f) is to be applied prospectively only to accidents occurring after July 1, 2006, the effective date of the statute.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated April 4, 2007, is reversed, and this matter is remanded to the ALJ for further proceedings and orders consistent herewith.

IT IS SO ORDERED.

⁵ *Lyon v. Wilson*, 201 Kan. 768, 774, 443 P.2d 314 (1968).

Dated this _____ day of July, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned would affirm the ALJ.

In *Owen Lumber Co.*,⁶ the Kansas Supreme Court stated:

[W]hile the distinction between procedural, remedial, and substantive laws is an important part of the analysis and a distinction we continue to draw [citation omitted], our analysis does not end there. As stated by one commentator:

“[T]his formulation of the rule [that the legislature may modify the remedies for the assertion or enforcement of a right], in addition to ignoring the other factors relevant in determining the constitutionality of a particular statute, is an oversimplification of the manner in which the [United States Supreme] Court weighs a statute’s effect on previously acquired rights. The Court has recognized that the removal of all or a substantial part of the remedies for enforcing a private contract may have the same practical effect as an explicit denial of the right. Thus the relevant factor in determining the weight to be given to the extent to which a preexisting right is abrogated is not whether the statute abolishes rights or remedies,

⁶ *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 223-27, 73 P.3d 753 (2003) (citing *Resolution Trust Corp. v. Fleischer*, 257 Kan. 360, 364-65, 892 P.2d 497 [1995] and quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 711-12 [1960]).

but rather the degree to which the statute alters the legal incidents of a claim arising from a preenactment transaction; the greater the alteration of these legal incidents, the weaker is the case for the constitutionality of the statute.”

. . . .

Additional examples could be cited which lead to the conclusion that, while we have applied the general rule that a legislature may retrospectively modify the remedies by which rights are enforced, we have not done so when the modification has the practical effect of abrogating the right. In other words, without specifically articulating so, even in the situation of remedial or procedural statutes, Kansas appellate courts have looked beyond the nature of the statute (procedural, remedial, or substantive) and examined how the rights were affected, whether there was a substitute remedy, and the public interest furthered by the legislation.

. . . .

The concept of allowing a reasonable time to comply with new procedures was also discussed in *Bailey v. Baldwin City*, 119 Kan. 605, 240 Pac. 852 (1925). In *Bailey*, the plaintiff was injured on May 23, 1922, and provided notice of his claim to the city on December 5, 1923. A few weeks later, a statute was enacted requiring such notice to be provided within 3 months of injury before an action could be maintained against the city. The *Bailey* court found that the notice statute could operate only prospectively. The court stated:

“The legislature had the power to fix conditions precedent to the maintenance of an action against the city but a restrictive condition which did not allow a party reasonable time after the enactment to bring an action for the enforcement of an existing right or to make compliance with prescribed conditions would be invalid.” 119 Kan. at 607.

In a more recent case, *Stevenson [v. Topeka City Council]*, 245 Kan. 425, 781 P.2d 689 (1989), this court relied in part upon *Bailey* in refusing to apply an amended notice statute retrospectively. 245 Kan. at 429-30. *Stevenson* would have had only 23 days to comply with the amended notice statute before her claim was barred. The court held: “A procedural statute will not be given retrospective application where a party does not have a reasonable time after the enactment of the statute to comply with notice requirements before the suit is barred.” 245 Kan. 425, Syl. ¶ 4. The court found that 23 days was not a reasonable time to comply with the amended statute. 245 Kan. at 430.

In each of these cases, without articulating the considerations, we have balanced the factors articulated in *Fleischer* by weighing the remedial or procedural nature of the statute against the determination of how rights were affected and whether any substitute remedy was provided. See *Fleischer*, 257 Kan. at 369.

The ALJ found that under certain circumstances, K.S.A. 2006 Supp. 44-523(f) could affect the substantive rights of a claimant if applied retroactively and, therefore, was not a procedural amendment only. However, the ALJ then reasoned that because the five-year period had not expired by the time the statute took effect and, therefore, claimant had time to prosecute her claim, the statute's effect was procedural as to her claim and would apply.

The new subsection would operate retroactively if its dismissal provision was applied in a case where the time limit ran before the subsection became effective, thus "blindsiding" the claimant with a dismissal. In this case, the claimant had 40 days within which to proceed to final hearing or show good cause for an extension of time. The claimant had a reasonable opportunity to comply with the new subsection's procedural requirement, but failed to comply. The claimant in this case was not "blindsided" by the new subsection, and it is not retroactive operation of the statute to hold the parties to a new procedural deadline occurring after enactment of the new law, which the parties could see coming.

The date upon which K.S.A. 44-523(f) operates is not the date the application for hearing was filed, but five years after that date. The statute would operate retroactively if it was applied to an application's "fifth anniversary" date that fell before the statute became effective, but if the application's fifth anniversary falls after enactment of the statute, the statute may be applied without retroactive effect. If a fifth anniversary fell after, but very near the statute's effective date, such that the claimant had no reasonable chance to comply, fairness may require some "grace period." In the present case, however, the fifth anniversary fell far enough past the effective date that it was not unfair to expect the claimant to comply on time.⁷

These Board Members agree with the ALJ's analysis. The Legislature has the power to change the conditions by which an injured worker must maintain an action against an employer for workers compensation benefits. Furthermore, statutes of limitations have been held to be remedial and can be applied retrospectively. Accordingly, the statute need not be applied evenly and equally to all claims. All claims are not entitled to the same five-year period before they are subject to dismissal. Because the statute is remedial, it can operate retrospectively, to affect accidents that occurred before its effective date. Instead of procedural versus substantive, the test is what constitutes a reasonable time after the enactment of K.S.A. 2006 Supp. 44-523(f) for the claimant to pursue her rights and either proceed to final hearing or obtain an extension from the ALJ. The statute should be applied to accidents that occurred before the effective date of the statute only where there has been a reasonable opportunity after the effective date of the statute to protect claimants' rights.

⁷ ALJ Order filed Apr. 4, 2007, at 2.

K.S.A. 2006 Supp. 44-523(f) is to be applied retroactively to accidents occurring before July 1, 2006, the effective date of the statute, only when it is reasonable to do so. In this case, claimant had 40 days from the effective date of the statute to proceed to regular hearing or obtain an extension of time from the ALJ. In addition, there was also a period of time from the date the Legislature enacted the amendment to K.S.A. 44-523 until it became effective. This should have alerted counsel to the need to prosecute this claim.

Under the facts of this case, these Board Members believe it is reasonable to apply K.S.A. 2006 Supp. 44-523(f) to this claim. The ALJ's dismissal of the claim for lack of prosecution should be affirmed. The Board need not reach the issue of whether the dismissal is with or without prejudice, as that issue has not been decided by the ALJ.

BOARD MEMBER

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge